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79432—36

In the Supreme Court of the United States

OCTOBER TERM, 1936

NOS.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ALBERT FRIED

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BENJAMIN EINHORN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Second Circuit, entered in the above causes on April 13, 1936, reversing the decisions of the Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 34–46) is reported in 31 B. T. A. 130. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 59) is not yet reported.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered April 13, 1936. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the respondents were dealers in certain securities in which they specialized so as to entitle them to inventory the securities at market value in determining income.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> * * * * *
>
> (c) *Inventories.*—Whenever in the opinion of the Commissioner the use of inventories is necessary in order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the Commissioner, with the approval of the Secretary, may prescribe as conforming as nearly as may be to the best accounting practice in the trade or business and as most clearly reflecting the income.
>
> * * * * *

Treasury Regulations 74:

ART. 105. *Inventories by dealers in securities.*—A dealer in securities, who in his books of account regularly inventories unsold securities on hand either—

(a) At cost;

(b) At cost or market, whichever is lower; or

(c) At market value,

may make his return upon the basis upon which his accounts are kept; provided that a description of the method employed shall be included in or attached to the return, that all the securities must be inventoried by the same method, and that such method must be adhered to in subsequent years unless another be authorized by the Commissioner. For the purpose of this rule, a dealer in securities is a merchant of securities, whether an individual, partnership, or corporation, with an established place of business, regularly engaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom. If such business is simply a branch of the activities carried on by such person, the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell or hold securities for investment or speculation and not in the course of an established business, and officers of corporations and members of partnerships

who in their individual capacities buy and sell securities, are not dealers in securities within the meaning of this rule.

STATEMENT

The cases were consolidated and involve the same question and the same facts. The facts were stipulated, and, as found by the Board of Tax Appeals, are, so far as material, as follows:

The respondents are members of the partnership firm of Albert Fried & Co. Each of the partners owned a membership on the New York Stock Exchange, where floor space was leased for the transaction of the firm's business. The firm also maintained an office in New York City. (R. 35, 37.)

The firm was a specialist in thirteen stocks traded in on the exchange. (R. 35.) It always had on hand some of the securities in which it specialized, and as of the end of each month of the fiscal year ended January 31, 1931, the year involved here, its supply ranged from 10,300 shares to 62,300 shares. (R. 36.) It filled orders for its specialties either by buying or selling its own securities or by matching like orders of a buyer and seller. (R. 35.) The firm held itself out generally and was known to all of the members of the exchange as the specialist in its thirteen stocks, and it was regularly and consistently engaged in the purchase and resale of those stocks. (R. 35–36.) Its

customers were other members of the exchange acting for themselves or as brokers, and during the taxable year the firm sold its specialties to 431 of these members. (R. 36.) All the stocks which the firm bought and sold were actually received and delivered by it. (R. 37.)

The firm's activities also included the purchase and sale for its own account of other stocks listed on the exchange. (R. 36–37.) On numerous occasions the firm purchased and sold the shares in which it specialized in order to stabilize markets and as far as possible tried to prevent wide fluctuation in those stocks. (R. 37.)

Ever since its inception the firm has regularly inventoried in its books of account its unsold securities on hand at market value, and in its income tax returns it has computed its net income on the same basis. (R. 37.)

In determining the tax liabilities of the respondents for the year here in question, the Commissioner denied their contention that the firm was entitled to inventory stock on the basis of being a dealer in securities, and accordingly asserted deficiencies against the respondents. (R. 9, 11; 21, 23.) The Board of Tax Appeals approved the Commissioner's action (R. 44), but the Circuit Court of Appeals for the Second Circuit reversed the Board, remanding the cases for further proceedings in accordance with its opinion. (R. 59.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the partners are dealers in securities so as to entitle them to the use of inventories in computing income.

2. In construing Section 22 (c) of the Revenue Act of 1928, *supra,* as embracing the business of the partners.

3. In holding that the partners had shown themselves to be within the scope of Article 105 of Regulations 74, *supra.*

4. In reversing the decision of the Board of Tax Appeals and remanding for further proceedings in accordance with its opinion.

REASONS FOR GRANTING THE WRIT

On May 18, 1936, this Court granted writs of certiorari (Nos. 24, 25, 26, October Term, 1936) to review the decision of the Court of Appeals for the District of Columbia in the cases of *Schafer* v. *Helvering,* 83 F. (2d) 317.

In the petition for writs of certiorari in those cases, the taxpayers asserted that those cases are in conflict with the decision of the Second Circuit in *Commissioner* v. *Stevens,* 78 F. (2d) 713, which the present case expressly follows.

The Court of Appeals for the District in its opinion in the *Schafer* cases stated (p. 318):

> Petitioners rely upon *Commissioner* v. *Stevens* (C. C. A. Second Circuit) 78 F. (2d) 713, and *Commissioner* v. *Charavay*

(C. C. A. Third Circuit) 79 F. (2d) 406, and insist that the facts in those cases and in this are indistinguishable; and in our opinion this is correct. If we follow them, we should be content to accept their conclusions as our own; but after careful thought, and with great deference, we are constrained to adopt a different view.

The Government filed a brief opposing certiorari in the *Schafer* cases, taking the position that the decision of the Court of Appeals in those cases was correct, and seeking to distinguish the *Schafer* cases from the *Stevens* and *Charavay* cases because of certain differences in the facts of those cases. The granting of the *Schafer* petition casts doubt on the soundness of the distinction which the Government sought to make. We believe, however, that the decision in the *Schafer* cases is correct and that the decision in the present cases reversing the Board of Tax Appeals is incorrect.

In view of the pendency of the *Schafer* cases, and in view of the asserted conflict between those cases and the *Stevens* case, which the instant case expressly follows, it is, we submit, desirable that this Court should also consider the application of the pertinent statute and regulation to the facts presented by the instant cases.

Wherefore it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

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